In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1129

ROBERT ANTHONY JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied effective assistance of counsel because his lawyer had previously represented two government witnesses in other cases, that the evidence was insufficient to convict him on Count 2 of the indictment, and that, if Count 2 was invalid, his sentence must be reduced.

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on four counts of violating the Mann Act, 18 U.S.C. 2421 and 2422. He was sentenced to consecutive terms of three years' imprisonment on Counts 1 and 2; concurrent sentences of four years' imprisonment were imposed on each of Counts 3 and 4. The total sentence was thus six years' imprisonment. The court of appeals affirmed (Pet. App. 1-7; 505 F.2d 898).

Evidence at trial showed that petitioner was a procurer in Atlanta, Georgia, and that Shirley Ann Newton and Cherry Dean Hill were prostitutes who worked for him. In March 1973, petitioner sent Newton and another prostitute to New Orleans for a week to earn $1,000 for him through prostitution (Count 1)(Tr. 30-31). Petitioner then required Newton to return to Atlanta, where she attempted to earn additional money from acts of prostitution to make the $1,000 before reporting back to him (Count 2). Her efforts were unsuccessful, and when she turned over only $300 to petitioner, he beat her viciously (Tr. 35-39). Shortly thereafter, petitioner took Cherry Dean Hill with him to Las Vegas, Nevada, and Oakland, California, where he compelled her to engage in prostitution (Count 4) (Tr. 152, 154). Petitioner ordered Newton to join them in San Francisco (Tr. 41), where she performed repeated acts of prostitution (Count 3), and he again beat her brutally (Tr. 43-44). The testimony of Newton and Hill was corroborated by other witnesses.

At trial, it became known that Newton had been represented by petitioner's counsel, Rogers, in prior criminal prosecutions. Rogers had also previously represented another government witness, Brenda Hill.

1. Petitioner's contention that he was denied effective assistance of counsel because of Rogers' prior representation of Newton is without substance. At the time of trial, counsel was not representing Newton in this case or in any other pending matter. Petitioner was well aware of the prior attorney-client relationship when he chose Rogers to represent him, having, in fact, given Newton the money to pay Rogers when he had represented her (Tr. 77). It is more likely that petitioner contemplated a decided advantage from counsel's familiarity with the major

government witness.[1] It is further clear that an effective and lengthy cross-examination of Newton was accomplished; counsel was able to establish that Newton had previously worked as a prostitute for another person, had previously been convicted on bad check and prostitution charges, and had lied to a vice squad detective concerning her activities as a prostitute (Tr. 66-105).

Since petitioner has failed to show prejudice in this regard, the conflict of interest issue is controlled by the criteria governing constitutionally effective assistance of counsel. *Harrison* v. *United States,* 387 F. 2d 614, 615 (C.A. 5). As stated by this Court, "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights * * * ." *Johnson* v. *Zerbst,* 304 U.S. 458, 465. There is no suggestion in the present facts that petitioner was uninformed of his rights or unable to protect them. His counsel, of his own selection, performed within the range of reasonable competence. *McMann* v. *Richardson*, 397 U.S. 759. That is all to which petitioner was entitled.[2]

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[1]As the court below pointed out (Pet. App. 5):

> Indeed, appellant likely thought he had an advantage in having counsel with complete knowledge of Shirley Ann Newton's previous history. In situations such as this where the client was aware of the previous relationship, we have denied such claims in the absence of a clear showing of prejudice. *Harrison* v. *United States*, 5 Cir., 1968, 387 F.2d 614, 615. We previously noted in a similar situation that "[a]ppellant cannot now, after knowingly completing the trial with such counsel, urge that he was prejudiced." *Nelson* v. *United States*, 5 Cir., 1969, 415 F.2d 483, 487-488, cert. denied, 396 U.S. 1060, 90 S.Ct. 751, 24 L. Ed. 2d 754 (1970).

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[2]The cases relied on by petitioner do not support his contention that he was denied effective assistance of counsel: *Craig* v. *Beto*, 458 F.2d 1131 (C.A. 5), dealt with failure to advise a defendant of his right to counsel; in *Carnley* v. *Cochran*, 369 U.S. 506,

2. Petitioner's contention that there was insufficient evidence on Count 2 of the indictment, charging him with causing the transportation of Shirley Ann Newton from New Orleans to Atlanta for the purpose of prostitution, is unfounded. He argues that at most Newton's travel back to Atlanta was for the purpose of bringing him her earnings in New Orleans and that it constituted merely a part of a single excursion and not a separate interstate transportation for purposes of prostitution (Pet. 20). However, the jury had before it ample evidence from which to infer that Newton was ordered back to Atlanta not only to transmit the proceeds of her prostitution for petitioner in New Orleans, but also to resume the prostitution she had carried on in Atlanta for petitioner since October 1972. There was no evidence to suggest that petitioner intended a termination of the established relationship. On the contrary, Newton's testimony that petitioner had called her several times during the week she worked in New Orleans, had cursed at her over how little money she was earning, and had directed her to return (Tr. 32), linked with the subsequent trip to California to work there suggests that Newton's trip to Atlanta was not just a return home but part of her continued employment. See *Nelms* v. *United States,* 291 F. 2d 390 (C.A. 4). The jury, by convicting petitioner on Count 2, properly so found.

The rule of *Mortensen* v. *United States*, 322 U.S. 369, on which petitioner mistakenly relies, is that an innocent trip across state lines made by a procurer and prostitutes cannot sustain criminal liability on the theory

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the record was silent as to whether the defendant had been offered and waived counsel; in *Johnson* v. *Zerbst, supra*, the defendant was convicted and sentenced without counsel; in *Glasser* v. *United States*, 315 U.S. 60, the defendant was deprived of effective assistance of counsel by virtue of the court's appointment of his counsel to represent a co-defendant, when the defendant had apprised the court of the fact that their interests might be inconsistent.

that, after returning home, the prostitutes returned to their trade.[3] The facts of the present case are clearly distinguishable from the circumstances of *Mortensen, supra.* Here, neither the outward nor the return trip was for an innocent purpose. Petitioner twice caused (indeed, coerced) Newton to travel interstate, from Atlanta to New Orleans and then back again, each time to engage in prostitution; each trip thus falls squarely within the language and intent of the statute. *United States* v. *Kotakes,* 440 F. 2d 342 (C.A. 7), certiorari denied, 403 U.S. 919; *United States* v. *Nichol,* 323 F. 2d 633 (C.A. 7); *Dunn* v. *United States,* 318 F. 2d 89 (C.A. 5).

3. Petitioner's corollary argument that the "rule of lenity" (Pet. 20) requires that he not be consecutively punished for two of the four convictions is without merit. In *Bell* v. *United States,* 349 U.S. 81, the Court dealt with the allowable unit of prosecution in Mann Act cases. The Court held that the statute does not create a separate crime for each woman transported across a state line where more than one are transported together. But while a single transaction involving several women may not be split up into more than one count in order to proliferate penalties, prosecution for one offense does not confer

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[3]The crux of the majority reasoning in *Mortensen* is expressed at 322 U.S. 375:

> The fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island. Nor does it justify an arbitrary splitting of the round trip into two parts so as to permit an inference that the purpose of the drive to Salt Lake City was innocent while the purpose of the homeward journey to Grand Island was criminal. The return journey under the circumstances of this case cannot be considered apart from its integral relation with the innocent round trip as a whole. There is no evidence of any change in the purpose of the trip during its course. If innocent when it began it remained so until it ended. Guilt or innocence does not turn merely on the direction of travel during part of a trip not undertaken for immoral ends.

immunity from prosecution for other distinct though related offenses. Here, each trip was properly charged as a separate offense. The fact that travel from one place to another is followed by travel in the opposite direction between the same points does not mean that the two movements are merely parts of a single excursion. The outcome is determined by the particular facts. *Nelms, supra.* In this case, the jury was properly instructed by the court as to the elements required in finding an offense under 18 U.S.C. 2422, and 18 U.S.C. 2421 (Tr. 248, 250), and had ample evidence before it to support the determination that petitioner was guilty of four separate transactions. (He in fact received consecutive sentences on only two of them.)[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]As an alternative ground for rejecting petitioner's attack on the sufficiency of the evidence on Count 2 and on his sentence, the court of appeals relied on a variant of the concurrent sentence doctrine, pointing out that petitioner was convicted on two other counts, either of which could have been used instead of Count 2 as a basis for a consecutive sentence (Pet. App. 7). While the situation presented on the hypothesis that the conviction on Count 2 was invalid is a somewhat novel one, the result was manifestly just in a case such as this, where it is clear that the district court's sentence was imposed in light of petitioner's activities and that the technical argument on which he bases his attack on Count 2 is manifestly irrelevant to selection of a sentence.